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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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BETTY BERNHART, et al.,

Plaintiffs,

v. 13 CV 2935 (RPP)

ASTA FUNDING, INC., et al.,

Defendants.
----------x

New York, N.Y.
December 3, 2013
4:15 p.m.

Before:

HON. ROBERT P. PATTERSON, JR.,

District Judge

APPEARANCES

NEW YORK LEGAL ASSISTANCE GROUP
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-and-
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BY: MITCHELL L. WILLIAMSON

(Case called)

THE COURT: Who is going to do the arguing?

MS. TARANTOLO: On behalf of the plaintiffs, your Honor, Danielle Tarantolo at the New York Legal Assistance Group.

MR. BERMAN: Your Honor, on behalf of the Asta defendants which are some of the defendants in the action, Josh Berman of the Trautman Sanders firm. I have with me at counsel table Eric Unis and Karen Lederer.

THE COURT: Josh Berman and who did you say? Anyone else arguing?

MR. BERMAN: I don't believe so, your Honor, no.

THE COURT: All right. I guess in this case it is the defendants' motion.

MS. TARANTOLO: Correct, your Honor.

MR. BERMAN: Yes, Judge Patterson, it is.

THE COURT: You'll begin, Mr. Berman.

MR. BERMAN: Thank you, sir. Good afternoon, your Honor. Again, my name is Josh Berman on behalf of the Asta defendants.

Just in the event that you don't recognize my name from the filings today, the reason for that is that I am new to the Trautman Sanders firm and I'm new to the case. In fact, my motion to appear was only filed yesterday on the docket. So, I wanted to bring that to your attention. And one more thing,

judge Patterson --

THE COURT: I probably haven't granted it yet.

MR. BERMAN: Fair enough. Well, would you grant it now?

THE COURT: I haven't seen it.

MR. BERMAN: It was just a notice of appearance.

THE COURT: That says where you were admitted, and I don't even know that you are admitted to the bar.

MR. BERMAN: I am, and I'm admitted to the Southern District bar specifically.

THE COURT: All right.

MR. BERMAN: If the Court will accept --

THE COURT: I thought maybe you were from out of state.

MR. BERMAN: No, sir. From 42nd Street, so uptown, but not out of state.

The other thing just to dispel any confusion at the outset, I share the same last name with the general counsel of Asta whose affidavit is before the Court, and I wanted to clarify there is no relation. That's a pure coincidence, matter of happenstance.

So we are here on the Asta defendant's motion to compel arbitration as to two of the named plaintiffs, Viruet and Roberts. And we've also moved for limited discovery as to the two other named plaintiffs, Bernhart and Brito.

So what I want to do at the outset is to dispel what I think or what I anticipate may be the Court's principal concern with respect to this motion right now. And it is no secret, which is our moving papers don't attach the specific account agreement between the named plaintiffs in this case, and AT&T Wireless.

I think a little bit of factual background would help the Court in understanding why we don't have those readily available and why that shouldn't be of any moment or of any significant concern to the Court.

So, first off, the account agreements between account holders and AT&T Wireless are not contracts in the sense that we think of them as lawyers. These are not documents that are provided by AT&T, negotiated between the account holder and AT&T, and signed in written format. The way these work is the way many long standard terms and conditions work. So what happens is you go to the AT&T store as an account holder, and you say I want a wireless phone, I want to sign up for such-and-such a rate plan, and the terms and conditions that are provided to you at the time indicate that your acceptance consists of using the account.

So once you open the account, you place a phone call, receive a phone call, send a text message or receive a text message, you are deemed to have accepted the terms and conditions. No one disputes that's a problem. The plaintiffs

haven't argued that these are problematic contracts of adhesion or anything like that.

Now, the underlying transactions in this case where my client purchased charged off accounts from AT&T occurred in 2004. Specifically July of 2004. And the way those transactions work, is en masse. In other words, Asta and its affiliates buy tranches of charged off accounts. So the transactions that led to the events of this lawsuit, I'll say, occurred almost a decade ago.

Since that time, this is sort of a key fact. Since that time, AT&T Wireless has gone through a number of corporate gyrations that I am not intimately familiar with. AT&T was acquired by Cingular, and then as I understand it Cingular was acquired by another AT&T entity, maybe AT&T parent or AT&T Mobile Communications.

THE COURT: Is Cingular a subsidiary of AT&T?

MR. BERMAN: Cingular as I understand was the parent at least for some time of AT&T Wireless Solutions, but I'm not familiar with every one of the twists and turns that has happened in terms of the mergers and acquisitions over the past decade.

The reason I raise that for the Court, however, is that we wish it were as simple as picking up the phone and calling AT&T and saying to whoever the contact is there, listen, we've been sued in a putative class action in federal

court in the Southern District of New York, and we need copies of the terms and conditions that were in effect during the period of time during which the specific four named plaintiffs open their accounts.

In fact, we tried that. Our client did reach out to AT&T, but the business contact that our client had nearly 10 years ago was no longer with the company. And the Court probably won't be shocked to find out when we reached out to AT&T and we sort of said, hey, we need these documents, their response was little more than a wave of the hand. Sorry. We're not a party to this action. This problem is not our problem; it's your problem. You haven't served us with a subpoena. We're not under any kind of order of the court to provide with you these documents. So AT&T essentially said you want documents, subpoena us.

Now, I'll address the difficulty with that or why we haven't done that to date in a moment. But let me first make the point, I think this is really the key point here. Is that what we have done by way of substitute, and it is an imperfect substitute and there is no getting around that, is we have gone through the public records, and we have found sworn statements, four of them, and they were attached to our moving papers. They were Exhibits A through D of the letter or affidavit from AT&T Wireless representatives in which they swore under oath the following: Every AT&T Wireless customer agreement from

1999 and onwards contained an arbitration provision.

Now, the plaintiffs have made a great deal of hay in their papers about the fact that those arbitration provisions contain some minor variances. Whether the customer splits the fees, whether AT&T bears the fee, these kind of things. There is one main aspect, or I should say two main aspects about which there is no variation and there is no real factual doubt, and that's the following. Every one of the agreements from 1999 onwards, customer agreements from AT&T Wireless to their customers, contains an arbitration provision. Every one of those arbitration provisions requires arbitration on an individual and not a class basis. And every one of those arbitration provisions says unless the dispute -- or unless a dispute -- and this is critical, relates solely, solely, to the collection of a debt the customer owes to AT&T, the dispute must be arbitrated.

Now the plaintiffs, your Honor, in their papers, have taken the position, and I expect they'll stand up and take the position today, first they'll say, well, these representative agreements, and they said in their papers, are not competent evidence. They are not competent evidence to establish that AT&T ever had the right to compel arbitration with these plaintiffs. But that is a profoundly academic argument. And especially I should say in the face of the FAA --

THE COURT: Isn't academic what the law is all about?

MR. BERMAN: That's a question that certainly I'm not competent to answer without extensive preparation.

But what I would say is the following. The fact that the AT&T account agreements contained an arbitration provision and the exception was for cases that relate solely to the collection of a debt is not sincerely in dispute.

And respectfully, with even a minimum of discovery, Judge Patterson, we believe that we'll be able in relatively short order to establish that to the Court's satisfaction.

In other words, you might think you've had a couple of months on this motion, why didn't you serve a subpoena on AT&T. That's a can of worms. If we start serving third-party discovery, or any discovery, suddenly there is a major issue relating to waiver. Have we waived our right to fight class certification. And we think there are profound, profound problems with class certification.

Just by way of preview, some of the named plaintiffs claim to be victims of identity theft. Others sort of loudly don't dispute that they once did have an account with AT&T but they claim that service was improper. And there are all kinds of highly individual identified issues that really splinter this fractious class.

THE COURT: That's for later.

MR. BERMAN: I understand. With the Court's approval, and if it were acknowledged on the record, that a narrow

subpoena from us to AT&T that would allow us in due course and short order, to obtain the specific account agreements that were in force when these specific named plaintiffs opened their account, this whole issue would be wiped off the table. And again, we can and will do that, only to the extent that we are permitted by the Court to do so without waiving defenses as to the larger issues, we perceive to be the larger issues of class certification.

In other words, we don't want to start out on this road of discovery only to be whipsawed and told in order to establish your right to arbitration to the Court's satisfaction, what you've done unwittingly is submit to the Court's jurisdiction, waive argument as to class certification. So, the comment I make on that point is I can't imagine what prejudice --

THE COURT: What authority are you relying on for this argument?

MR. BERMAN: Sorry?

THE COURT: What authority are you relying on for this argument?

MR. BERMAN: If I can just have a moment to grab my papers. We have multiple copies of each. But the two precedents that I would tender to the court are both Second Circuit precedents. And they are somewhat anomalous, because ultimately the right to compel arbitration in both cases was

denied. But only, only after limited discovery of the kind that we're requesting here, respectfully, was granted.

The first one I would cite is James Dreyfuss v. Etelecare Global Solutions. Maybe I ought to simply read the citation to the reporter. That's at 349 Fed.Appx.

THE COURT: I have it in front of me.

MR. BERMAN: Okay. And the other case, again, I am not entirely certain how to pronounce this, is Christopher Specht is the first one of the purported class plaintiffs. And that's against Netscape and what was then known as America Online, now AOL. And that's 306 F.3d, 17.

THE COURT: What part of the cases are you relying on for your statements?

MR. BERMAN: TGS which was the defendant -- TGS is the acronym, filed the motion to compel arbitration. There was a problem that came to light immediately, just as the kind of technical problem that came to light immediately here. In that case, the employment agreement that purportedly contained the arbitration clause that was tendered in motion to support the arbitration, the Court doesn't describe why, but it was apparent it wasn't the original. Ultimately the Court permitted some discovery to allow TGS to try to obtain the original employment agreement so that it could further substantiate its claim to arbitrability.

Frankly, that's militated by the policy concerns that

underlie the Arbitration Act. The notion is that it would be a vital right for us to waive or for the Court to deprive my clients of without even the right to obtain some narrow discovery.

THE COURT: Of whom?

MR. BERMAN: Sorry?

THE COURT: Of whom?

MR. BERMAN: Of AT&T or whatever the correct corporate name is now. But I'll call it AT&T. With respect to Viruet and Roberts. And with respect to all of them.

THE COURT: How does this show that you are on the horns of a dilemma? Those are my words, not yours.

MR. BERMAN: I think I understand what you are asking, Judge. We won't be on the horns of a dilemma going forward.

THE COURT: Why are you now?

MR. BERMAN: We were concerned when we served discovery -- so which is what I tried to articulate probably inexpertly earlier. We are concerned if we went ahead and sought discovery by means of a subpoena to AT&T, even a narrow subpoena, we would have submitted to this court's jurisdiction. This subpoena power emanates from the court. And there is authority apparently --

THE COURT: You filed a notice of appearance. Didn't you submit to the court's jurisdiction?

MR. BERMAN: I believe that merely showing up to argue

the motion to compel arbitration is not deemed to be a waiver of the right to arbitrate. By contrast, the concern was and the concern could be alleviated immediately by you, Judge Patterson, or even by agreement --

THE COURT: I haven't heard this in the motion papers. Have I? I haven't seen it.

MR. BERMAN: I don't know that the broader explanation of this background was set forth in full in the motion papers. What I wanted to do is take this opportunity to explain to the Court why, as a practical matter, it is not as easy as someone might think to just get the right copy of the terms and conditions and tender it in support of our motion to compel arbitration.

THE COURT: You haven't given me any law.

MR. BERMAN: Respectfully, I am not sure I think that's the case. I think the Dreyfuss case stands for the principle that the Second Circuit, especially in view of the policy considerations of the FAA, strongly favors at least limited discovery.

THE COURT: What part of it are you relying on?

MR. BERMAN: I guess I would say the end of page five and the beginning of page six, there is the following quote: This is not the law, it is true when considering the question of whether a particular dispute -- I don't know that the Court wants me to read this out loud.

THE COURT: I've gotten where you are. What are you relying on?

MR. BERMAN: Well, I am not sure how to articulate it --

THE COURT: Citing Moses H. Cone Memorial Hospital v. Mercury, a well-known case.

MR. BERMAN: Those cases are broader. Obviously those cases support --

THE COURT: I don't see where it givens me this horns of dilemma problem that you're suggesting.

MR. BERMAN: Maybe, let me try this again. What I'm not saying -- I'm not saying that we are on the horns of a dilemma.

THE COURT: But you were on the horns of a dilemma is what you are saying.

MR. BERMAN: In other words, you want a case that explains -- I think I understand the question now. I would have to submit that by way of follow up.

In other words, you want a precedent that says were we to have attempted to take third-party discovery by means of a subpoena on AT&T, that would have been deemed a waiver of the right to arbitrate.

THE COURT: Yes.

MR. BERMAN: Do we have that with us?

MS. LEDERER: We don't.

MR. BERMAN: I'm happy within 24 hours to file a supplemental.

THE COURT: If you are relying on that, you should have it here.

MR. BERMAN: Okay. So, in all events, Judge, on that particular issue I would conclude with the simple point that no one would be prejudiced by a very, very brief, narrow, limited discovery period that would allow us to get the specific terms and conditions. And it seems to be the appropriate thing to do, in view of the FAA's strong policy favoring arbitration.

Now, let me just address a couple of the other arguments that the named plaintiffs raised in their papers in opposition to our motion. The first one, it is a little bit tricky to respond to, the first one is we haven't established for the Court that the Asta defendants were really the assignees of AT&T.

So, obviously, our position is that as the assignee of the charged off accounts, we stand in the shoes of the assignor, which is to say AT&T, and we hold all of their rights and privileges under the relevant agreements.

I have to say at the outset, I think the argument that we haven't established that we are the true assignee is disingenuous almost in the extreme. And I say that because this entire case is predicated on the inflammatory allegation that our client's business model -- this part is not

inflammatory -- that our client's business model is to go out and purchase tranches of debt from AT&T, and that's in fact what we did.

THE COURT: That doesn't mean you are assigned.

MR. BERMAN: We did do that.

THE COURT: That doesn't mean they were assigned.

MR. BERMAN: No, so --

THE COURT: Which any corporate lawyer, and I practiced corporate law as well as litigation, would have it right in the contract that it is an assignment as well as a purchase and sale, and you assign the accounts pursuant to a purchase and sale, and it would be right in the agreement. So, you should have it.

MR. BERMAN: It is.

THE COURT: What you've got is a lot of companies that have sprung up and they have a variety of counsel and they are not as careful as we used to be. Or as your firm and my firm and all the firms assembled here.

MR. BERMAN: Judge Patterson, we did tender that. That is the first exhibit to the affidavit of Seth Berman, which was appended to our moving papers. There is a master purchase and sale agreement.

THE COURT: That's what I'd like to see.

MR. BERMAN: I should say it is coupled with the sworn statement in the covering affidavit that Palisades is the

assignee of AT&T Wireless. It is right on page two, your Honor. In paragraph 2.1 of the agreement. It says agreement to purchase. Subject to terms of this agreement, on closing date AWS, that's AT&T Wireless, agrees to sell and assign.

THE COURT: That's a long ways from getting to the chain of title or assignment. There are other parties in here, right? Besides Wireless and your client.

MR. BERMAN: No, this is it. This is the purchase and sale agreement is directly between Palisades Collection, which is one of the Asta defendants.

THE COURT: Oh.

MR. BERMAN: And AT&T Wireless.

THE COURT: Yes. But then weren't there further assignments?

MR. BERMAN: No.

THE COURT: Asta Funding wasn't involved?

MR. BERMAN: No. So Asta Funding is the parent of Palisades Collection. There is a separate argument, by the way, that the plaintiffs have made with respect to the parent. What they say is even if the Court deems -- and I respectfully submit that the Court ought to deem -- that Palisades is the valid assignee and it's been established to the Court's satisfaction of AT&T Wireless rights, the defendants haven't shown that the parent can avail itself of the arbitration right.

Now, there is a very common sense response to that, and I would tender it to the Court as follows. This is a complaint that accuses my clients, meaning Palisades, the individual CEO, and Asta, of being a RICO enterprise. An entity that operates seamlessly, one and the same, for purposes of the Fair Debt Collection Practices Act, for purposes of the guillotine under RICO. But of course, when it comes to availing ourselves of the right to arbitration that's in the agreement, we are a whole bunch of separate entities. That's just inconsistent.

THE COURT: Okay. Let's move on then.

MR. BERMAN: Okay. Just one related thing I want to address sort of anticipate for the Court. I think you are going to hear when the plaintiffs argue is all you see is a master purchase and sale agreement. You don't have a bill of sale for each of the individual named plaintiffs. I just want to clarify for the Court that when tranches of debt of this magnitude are bought, or sold and bought, this is the means by which those transactions are effectuated.

It may be, and I don't want to over assume, but it may be that the plaintiffs and their counsel are used to seeing more streamlined debt collection actions in which an ordinary cause of action for accounts stated or something like this in state court is supported by nothing more than the bill of sale. But when our clients contract with AT&T to purchase these large

tranches of debt, the way it was effectuated was by means of a master agreement. So I want the Court to be aware of that.

The next argument that the plaintiffs made in their papers is that even if the Court accepts the sort of sample agreements, AT&T Wireless agreements that we've tendered, and even if the Court believes that the Asta defendants' group are proper assignees, there is an exception in the arbitration agreement for actions that relate to the collection of debt. So if you're AT&T and you want to go collect a debt, you can do it in court. But there is a glaring omission. The language in every single one of the AT&T customer agreements that we've tendered to the Court as exhibits to the letter affidavit, and I would represent if we're able to get the specific agreement that was in force at AT&T pursuant to some limited discovery, every one of them says that the exception applies to actions solely related to the collection of debt. And that word, the importance of that word, I should say, just can't be overstated.

To call this an action, the present putative class action which seeks relief under the FDCPA, which seeks relief under New York General Business Law 349, which seeks relief under the RICO, which seeks relief under judiciary law, to say this is an action related solely to the collection of debt is just inconsistent with the plain language of the exception to the arbitration provision.

The authority there is when a contract is crystal clear on its face, the Court will give meaning to the natural, give effect to the natural meaning of the words.

I think we talked about discovery. One of the plaintiffs' concerns or arguments was we haven't served discovery or identified specifically what discovery we would take. I'll touch on that just very briefly because I think we spoke about it. Two of the named plaintiffs, Brito and Bernhart, deny they ever had accounts with AT&T Wireless.

THE COURT: I thought they were Viruet and Roberts.

MR. BERMAN: Those two sort of loudly don't deny it. The other two, Bernhart and Brito, say, hey, we were the victims of identity theft.

THE COURT: I do remember that.

MR. BERMAN: In the exercise of zealous advocacy, I feel compelled to point out that all this tells us or what this tells us principally is the incredibly fractious nature of this purported class. It is not an accident, of course, that the class is defined as everyone who was sued or may be sued by the Pressler law firm, which I understand is not like saying everyone who is sued or may be sued by the Hughes Hubbard firm or something like this. It is a different business model and I get that.

It is nevertheless, I would submit, a very problematic definition of a putative class. With respect to Bernhart and

Brito, they claim that they were the victims of identity theft. Now, I should add there were state court judgments entered against them, Bernhart and Brito. Those state court judgments were vacated. But the opinions vacating the state court judgments say nothing whatsoever about the issue of identity theft.

THE COURT: They were vacated?

MR. BERMAN: They were vacated. But so far as we can tell, the basis for vacatur had to do with the effectiveness of service. And it is one of these two line -- you can't tell from the face of the opinion.

So, what we would want, look, if they were victims of identity theft, first of all, that's not necessarily an issue that Asta is on the hook for. They may or may not be. But, the question, the facts pertaining to whether Brito and Bernhart were in fact victims as they claim of identity theft, that's within their possession. The information related, we couldn't possibly have that information. So it wouldn't even be in AT&T's possession presumably. Maybe a complaint was lodged, maybe the police department. But I don't think we need to do anything that far reaching.

What we would want with respect to Viruet and Roberts, essentially we want the right to serve a subpoena on AT&T that says please provide us with the specific account agreement that was in force during the time period of these two accounts. And

then with respect to Bernhart and Brito, we would want the right to take discovery from them on the issue, and only on the issue, of the claimed identity theft. And we'll see how that shakes out.

As an interesting corollary of that, in the plaintiffs' papers, and these are arguments in the alternative, even if you buy everything that the Asta defendants say, what you ought to do, your Honor, is you ought to stay the case as to Brito -- I'm sorry. Ought to -- my mistake. You ought to -- if you are inclined to order arbitration with respect to Viruet and Roberts, that's fine, but the case shouldn't be stayed as to Bernhart and Brito, it ought to proceed.

Now, first of all, I would submit that's almost tantamount to an acknowledgment of the degree of fractiousness in the purported class. Now we have a class of people who were AT&T account holders, it's established to the Court's satisfaction, that's going forward in arbitration. Then we have another class of people who were purported victims of identity theft and whose wages were nevertheless garnished and wrongfully subject under the FDCPA, under the RICO, proceeding in federal court.

That's a waste of the court's resources and it is sort of contrary to common sense to certify a class and look, I know --

THE COURT: I'm not on that argument yet. You're

moving on to something else.

MR. BERMAN: All right. So for better or worse, it was in the papers. I wanted to highlight it for the Court's attention. That's really it, unless the Court wants to hear a few words about the Rooker-Feldman argument that found its way into the same papers. Rooker-Feldman is this --

THE COURT: I know.

MR. BERMAN: So, Mr. Viruet sought in the state courts to have his convictions vacated. And the court denied those motions. Finished. Right. The Social Security numbers were matched up, the Ts were crossed, the Is were dotted to the state court's satisfaction.

In effect, in practical effect, as to that named plaintiff, as to Mr. Viruet, this action is an attempt, no matter how you skin the cat, to undermine or to in effect reverse the state court judgment.

So, you will hear from the plaintiffs about why they disagree with that. We see no way around it. It didn't escape our attention that the complaint was actually amended to add Mr. Viruet as a plaintiff at some point in the process. The argument on Rooker-Feldman relates only to that individual named plaintiff, and the argument is really that straightforward. There is no way around the reality that the claims here -- by the way, it is not like you see a prayer for relief where they say we want relief on behalf of Mr. Viruet

but we expressly carve out the judgment against him in state court. They don't carve it out. They want that money back.

So the conclusion is really inescapable from our standpoint that Rooker-Feldman would preclude the matter from proceeding with Mr. Viruet as a named plaintiff.

If I can have a minute to look over my notes, I think those are the only items I wanted to bring to the Court's attention at the outset. One last thing. I can raise it if the Court is going to give me an opportunity to be heard again.

THE COURT: You'll have a reply.

MR. BERMAN: Then that's all for now. Thank you, your Honor.

MS. TARANTOLO: Good afternoon, your Honor. Again, my name is Danielle Tarantolo, I am an attorney at the New York Legal Assistance Group appearing on behalf of the plaintiffs.

Your Honor, Mr. Berman has just now before the Court conceded that he agrees with the plaintiffs that they have not provided the contracts that they claim bind these individuals against whom they've moved, Mr. Roberts and Mr. Viruet, to arbitrate these claims. We think that that ends the inquiry.

All of the rest of this talk about how other people had entered contracts, the manner in which they entered those contracts, what contracts those other people entered, none of it is relevant here.

Arbitration is a matter of contract, and it is their

burden to establish that these individuals, not other individuals, entered agreements to arbitrate. And they haven't done that.

Instead of introducing these contracts, they have asked the Court and here asked the Court essentially to infer that these individuals may have waived their rights to litigate in court on the basis of other four other people's agreements to arbitrate that were produced in other cases. And they simply can't do that.

Mr. Berman relied on the fact and the defendants' papers rely on the fact that all of the sample agreements that they did provide that purportedly govern these other people's accounts --

THE COURT: Are you answering arguments here or are you going to go further and answer in more detail with citations to cases?

MS. TARANTOLO: Your Honor, whatever the Court would prefer.

THE COURT: I don't prefer either one, I just want to know, because I would expect citations to the cases you are relying on in oral argument.

MS. TARANTOLO: Understood, your Honor. For the proposition that the party moving to compel arbitration has to produce, identify the contract that purportedly binds the party to arbitrate, there are hundreds of citations. That is very

clearly the law on arbitration.

With respect to the specific issue, however, of whether these differences among the arbitration agreements -- let me back up.

They are essentially arguing it is immaterial that the sample agreements that they've provided that other people entered differed from one another. We think that's absolutely not the case. The Opals On Ice case that we cite in our brief, for which I can provide the citation. That is --

THE COURT: I am aware of the case.

MS. TARANTOLO: You have it, your Honor?

THE COURT: Yes, I do.

MS. TARANTOLO: In that case, unlike here, there were actually signed documents that evidenced the parties' intention to arbitrate. The problem there was that one party had signed a version of the arbitration agreement that specified arbitration in New York, and the other party signed a version of the arbitration agreement that specified arbitration in California. In that case, even though they did actually produce contracts signed by both parties, the court held that wasn't enough, because there has to be a meeting of the minds to establish a contract to arbitrate. Not just on the abstract concept of arbitration, but on the specific procedures that would govern arbitration.

I'd like to turn for one moment to what Mr. Berman

explained by way of factual background for the Court in terms of how parties supposedly enter contracts like these, these cellular phone contracts that supposedly contain the arbitration agreements.

As Mr. Berman explained, and we don't dispute that this is not a situation where we are demanding they produce a signed contract that was signed by these individuals. We understand that's not the manner in which they are contending that contracts like this are formed.

What they have described in the other declarations that relate to the other AT&T Wireless customers is a process by which individuals sign up for phone service, and then they receive a phone, and in the box with the phone is a little booklet, and in the booklet is, among many, many other things, a provision mandating arbitration.

They haven't even contended, represented, much less established by any evidence, that that's what happened with respect to these individuals. They've said nothing whatsoever about the manner in which these individuals supposedly entered any contracts. But they are clearly suggesting to the Court, and even if they were relying on the idea that our clients may have entered contracts in this same manner, the receipt of a booklet in a box, they can't do that here. Because with respect to these specific individuals, they have already represented in sworn statements made to the state court in the

collection actions that related to Mr. Roberts and Mr. Viruet, that those individuals received any governing terms and conditions in the mail. And they can't now come before this Court and claim a different method of notification of the contract terms than what they have already asserted in this earlier judicial proceeding.

THE COURT: Are you saying that the telephones they were supplied with and the box and all were not sent through the mail?

MS. TARANTOLO: Well, what Mr. Berman has just represented is the individual goes to the store and purchases the box. In any event, it hardly matters, because they haven't actually said what way they think that our clients received any contracts. This, your Honor, is a totally separate deficiency from failing to actually identify the terms of the contract, each of which is fatal to the motion.

We understand that the law has evolved, and I don't always need to have a signed contract between two parties to show that an agreement to arbitrate was formed. Sometimes contracts can be formed in a more passive process like the one they described.

We think that the process described in these other declarations strains the boundaries of what's permissible, and should they ever actually represent with evidence that that's what happened here, we can talk about that then.

THE COURT: That would be after purchase, wouldn't it?

MS. TARANTOLO: I'm sorry?

THE COURT: Then the terms would be received after purchase under that system?

MS. TARANTOLO: Yes, that's my understanding. And there are circumstances in which contracts can be formed in that manner. But, the Second Circuit as well as many, many other courts, including in the Specht v. Netscape case that Mr. Berman just cited for the Court, have been very clear that is a process that is amorphous and it is subject to abuse. As a result, it is very important that the party attempting to meet its burden to establish an agreement to arbitrate has to be very specific about the manner in which the individual who supposedly entered the contract was notified or put on notice of the terms of the contract and then subsequently assented to the terms of the contract.

And our point is that this -- Mr. Berman maybe would describe this as academic -- it is a hard and fast rule. You have to show a meeting of the minds on the agreement to arbitrate. And our point is that they have offered nothing here to the Court at all, whatsoever, with respect to how these individuals entered a contract. And that in fact, anything that they could say that would establish a parallel process to what was described with respect to these other individuals in the other court cases is not one that they could rely on here,

because it contradicts their earlier representation.

THE COURT: Is there any particular cases that you are relying on, on this?

MS. TARANTOLO: Yes, your Honor. With respect to notification and assent, there is the Hines v. Overstock case which we cite in our brief. I can give the Court the citation.

THE COURT: I have it.

MS. TARANTOLO: You have that one? And the Schnabel v. Trilegiant case, also cited in our papers, 697 F.3d 110 (2d. Cir. 2012). Schnabel, if I recall, does not rely on New York contract law. But it is the same principle that I don't think that anyone could dispute that all states contract laws require you to show that a contract actually was formed before you can enforce any rights that ostensibly are in the contract.

If your Honor has no more questions on that particular issue, I'd like to turn to this question of discovery. And defendants have now stated that they would like to take discovery both from AT&T and also from Mr. Brito and Ms. Bernhart, the other two named plaintiffs against whom they haven't yet moved.

If they want to take discovery from all of these parties, we say fine. Let's move on and have merits discovery in this case now. They've had their opportunity to make their motion. They made it. They could have requested discovery in advance of making what we believe is the deficient motion that

they have made with respect to the two plaintiffs against whom they have moved, and they didn't make that request. Instead, they gave it a shot and they have put forth what we believe are woefully insufficient papers in support of that motion. We think that motion should be denied now and we should move on with this case. They can take discovery from AT&T as well as from our client. We'll take discovery from them. And if they want to later make a motion that they believe they might be able to cure some or all I guess of the many deficiencies in their current motion, they can make it later.

THE COURT: Discovery would be in connection with a class action motion?

MS. TARANTOLO: We would like to have a scheduling conference with the Court as soon as possible to set forth the discovery schedule. We haven't yet discussed with defendants whether it would make sense to bifurcate discovery or do discovery all together.

THE COURT: You agree it would cover the class action motion also?

MS. TARANTOLO: Discovery would eventually certainly, yes, at some point.

THE COURT: Prior to the class action determination.

MS. TARANTOLO: Yes, your Honor. We would want to take discovery before.

THE COURT: Or putative class action.

MS. TARANTOLO: Correct.

To move now to a moment to the issue of the assignment of these accounts. We are agreed the purchase and sale agreement that defendants have provided says what it says. It says that some accounts are being transferred from AT&T Wireless to Palisades. It also says that any specific transfer from AT&T to Palisades under the terms of that master agreement will be documented by a bill of sale. That is the document that actually establishes the chain of title to the account. And defendants' original submissions included one bill of sale only, and they have admitted it is not in fact the bill of sale even they purport to have transferred these particular individuals' accounts.

THE COURT: Which particular?

MS. TARANTOLO: The accounts in the names of Mr. Viruet and Mr. Roberts. Again I suspect that -- Mr. Berman claims that the other Berman -- the other Mr. Berman, Seth Berman, the general counsel of Palisades, he stated in his affidavit that these particular Viruet and Roberts accounts were transferred. That's clearly not enough, that's a best evidence problem. They need to show the actual bill of sale, and they didn't do that in connection with their motions.

Even in their reply submissions, which the Court has we think properly agreed to disregard, they provided other bills of sale. But still nothing that links those bills of

sale to these accounts. And we understand that these are transactions that occur in bulk. We also understand that Palisades and Asta make purchases like this at substantial discounts, and they don't always get all of the paperwork that exists with an account. Frankly, that's a risk that they take on when they take the transactions. It simply it is not academic. It doesn't absolve them of the responsibility to establish that they are the assignees of this account.

So in that sense, I agree that this question of assignment -- I agree with Mr. Berman that the question of assignment in some ways does go to the heart of this case. Because the heart of this case is that they litigate against individuals like our clients without having the proper documentation. And that's precisely what they've done here when they have moved this Court to compel arbitration without having the right documents.

And as your Honor observed, the law is academic. You do have to make those showings. That's what the requirements are there for.

To turn for a moment very briefly to the issue of estoppel which goes to Mr. Berman's point that those of their clients who were not assignees should not be able to enforce the agreement of the assignees by virtue of their relationship. Let me say that again.

The estoppel concept goes to the question of under

what circumstances a non-signatory to an agreement or a non-party to an agreement, such as these defendants, can enforce an agreement entered by another party.

The one point I want to make is that Mr. Berman in his argument now and in the defendants' papers focused on the allegations of coordinated conduct in the complaint. We disagree with their characterization of the complaint. But in any event, that's only one of the elements they would have to show. They also have to show that the subject of this dispute is intertwined with the subject of the agreement that contained the arbitration clause. That was an agreement for cellular phone service. This is a lawsuit about improper debt collection practices.

For some, but not all of our class members, that may have been but for cause of the parties of their eventually getting sued, but that's not the same as showing that the dispute is intertwined with the relationship.

One final point, your Honor, with respect to the exclusionary clause. The law is clear that an arbitration contract should be interpreted just like any other contract. And it is the Court's responsibility to give effect not only to the parties' agreement, to send certain disputes to arbitration, but also their agreement to hold back certain disputes from arbitration.

The exclusionary clause that we're discussing, I'll

just read it very briefly, it's very short, it says: "You or we may choose to pursue claims in court if the claims relate solely to the collection of any debts you owe to us or that the customer owes to AT&T."

These claims relate only to debt collection. Palisades is a company that acquires debts only to collect on them. There is no other aspect of the customer relationship between a customer and AT&T that is remotely implicated by this case. They would prefer, apparently, that the clause read "we," not "we or you," but "we may choose to pursue claims in court if those claims are for the collection of a debt." Rather than "relate to the collection of a debt." And unfortunately for them, that's simply not what the clause says. This Court has to give meaning to the words of the clause, and the words of the exclusionary clause encompass this dispute.

If your Honor were to deny the motion to compel as against Mr. Viruet, your Honor would have to reach the Rooker-Feldman issue, so I just want to say a few very brief words about the motion to dismiss on Rooker-Feldman grounds.

The Supreme Court has pared down the Rooker-Feldman doctrine to its very core. This was in the Exxon Mobil case in 2005. It covers only cases in which a plaintiff goes to federal court and seeks what is in substance appellate review of the state court decision.

That is not what we are asking the Court to do here.

We are not seeking to vacate or overturn the judgment in the state court. Our prayer for relief nowhere says that's the relief we are seeking.

What we're seeking is compensatory damages. It is not the same thing, and the Supreme Court and Second Circuit has made clear that the question is whether the judgment will be left on the books. And here, even if we get all the relief we are seeking, the judgment would be left on the books.

It is also distinguished by the fact that we are not seeking to have this -- appellate review asks whether a state court got something wrong on the record before it or made a mistake or legal error. That would be harm that's imposed by the state court judgment. That's not the harm that we are asking the Court to examine here. We are asking the Court to look at the harm caused to our clients, to these named plaintiffs, by the litigation misconduct or alleged litigation misconduct of these defendants. That's a separate question.

I think there are a number of cases, I could give the citations if the Court wants, but many of them are in our brief. Many, many courts have examined the application of the doctrine in cases very similar to these, where individuals sought compensatory damages in federal court that were related to but didn't seek to overturn a state court judgment. And those courts conclude that the doctrine doesn't apply here.

Unless your Honor has any other questions, that will

conclude what I have to say. Thank you, your Honor.

THE COURT: Mr. Berman.

MR. BERMAN: Thank you. Thank you, Judge Patterson. I've made myself a list numbered one through six. So hopefully I can make each point concisely.

The first and by far the most important point I want to make, and we've heard this for the first time in counsel's argument a moment ago, is this notion that the plaintiffs ought to be entitled to take merits discovery now prior to class certification. That's an extreme position. It is an extreme position, especially in light of the fact that the class on its face is a fractious class, with highly individualized issues that are brought into relief by the complaint itself. Some are victims of identity theft; some are not. Some had accounts with AT&T; others didn't. Some got their underlying vacated; some didn't get it vacated. The notion of being forced into extraordinarily expensive full-blown merits discovery prior to class certification in the context of an argument --

THE COURT: They asked for a conference on the discovery. All I was ascertaining was whether you would be limited in some way in your discovery of the class. And their response was no. That's what I understood.

MR. BERMAN: Okay. That's fair enough. I just thought it was important enough to bear mention we would vigorously oppose going into full-blown discovery.

THE COURT: That's for another day.

MR. BERMAN: The second point is Ms. Tarantolo said we have submitted literally nothing. No evidence, nothing, no competent evidence. Sort of a poignant statement. I just don't think that's accurate.

I think as a practical matter, we've met the burden, and the burden is articulated precisely in the Hines v. Overstock case. I am going to read it to you. It is in the plaintiffs' papers. It is in their papers. The burden is that the movant seeking to compel arbitration -- and here is the quote -- must make a prima facie showing of entitlement to arbitration.

I don't think there is any question that we've made a prima facie showing as a practical matter that an agreement to arbitrate existed. By the way, I didn't represent anything. I don't know if these particular four named plaintiffs 10 or 12 years later, whether they went to the store and opened their account, whether they got their phone and terms and conditions in the mail. I don't know.

But I know, and I think the evidence in the public record is crystal clear, that the terms and conditions of the AT&T Wireless service agreement contained an agreement to arbitrate.

I don't want to retread what I said about opportunity to take limited discovery. We could prove it even further if

necessary. I wanted to highlight to the Court what the showing is that's required. We don't have to prove by clear and convincing evidence. We don't have to prove beyond a reasonable doubt. We have to make a prima facie showing.

THE COURT: What part of Overstock are you referring to? The difficulty in Overstock's position is the party seeking to invoke the FAA paragraph four must make a prima facie showing that an agreement to arbitrate existed.

MR. BERMAN: That's right.

THE COURT: Before the burden shifts to the party opposing the arbitration. Making that agreement in issue.

MR. BERMAN: That's exactly the part we are relying on.

THE COURT: All right. Go ahead.

MR. BERMAN: Look, no question they are saying okay, now we've borne the burden that we've opposed it. We say none of these contracts bind the individual plaintiffs. But --

THE COURT: Then you leave out the next part. It says in the context of the motions to compel arbitration, the court applies a standard similar to that applicable for a motion for summary judgment.

MR. BERMAN: Exactly. A motion for summary judgment would be improper without any discovery.

THE COURT: A party seeking to invoke FAA paragraph four must make a prima facie initial showing that the agreement

to arbitrate existed before the burden shifts to the party opposing arbitration in the making of that agreement in issue. In the context of motions to compel arbitration, the court applies the standard similar to that applicable for a motion for summary judgment.

MR. BERMAN: Judge Patterson, what we say to that is surely, surely, there is an issue of fact here at a minimum.

THE COURT: You've got to demonstrate that an agreement to arbitrate was made. That's the next sentence right after the one I just read you.

MR. BERMAN: Here's what is before the Court. We have sworn testimony from representatives of AT&T. Sworn testimony. In four cases, every single customer agreement after 1999 contained an arbitration provision.

THE COURT: That arbitration provision is worded in a certain way under the contracts. So-called contracts.

MR. BERMAN: So all we are requesting is the opportunity to -- you send these document requests and they are pages and pages long. Our document request to AT&T can be one. Can be one request. "Please provide the customer agreement that was in force between January 2002 and June 2002." Whenever it was that these customers opened their account. Give it to us. And they unfortunately won't do it without a subpoena.

THE COURT: Okay.

MR. BERMAN: So that's --

THE COURT: You didn't choose to subpoena them.

MR. BERMAN: Again, I don't want to retread the ground we went over. Without the Court's imprimatur, engaging in that kind of discovery by subpoena could subject us to the jurisdiction of the court and waive the claim to arbitration. So, we needed to at least get on the record that seeking those documents by means of a subpoena would not amount to a waiver of the right to compel arbitration.

THE COURT: You have no authority for it.

MR. BERMAN: With the Court's permission, we would send it in by the close of business lawyer time today.

As to a couple more quick points, I'll get to them quickly. As to this bill of sale issue, I get to do this because I'm new to the firm, so my name wasn't on those papers, and the Court rejected some additional information that we submitted in connection with the second affirmation of the general counsel of the company.

But, respectfully, in light of the argument we're having here today, I would ask the Court, if not formally to reconsider, to see it slightly differently.

THE COURT: It is a motion to dismiss. But go ahead.

MR. BERMAN: The notion is they sued us, and they said you guys go out and buy debt, you buy these tranches of charged off accounts, you own them, and you engaged in this far-ranging

conspiracy to collect. To go out and collect them through improper means. Nobody said at any point we don't think you really own them. We don't really think you are the proper assignee of these accounts. It wasn't an issue.

It would be anomalous or it would be odd if in our moving papers to start establishing a kind of chronological chain of title. It is in the complaint. So, it feels a little bit like being sandbagged. You get accused of being part of this quasi-criminal conspiracy as a buyer of tranches of charged off accounts. And then you say, all right, well, as the assignee of these charged off accounts, we have the right to arbitrate. And they turn around and say, no, ah-ha, we got you, you haven't proven that you really were the assignee.

THE COURT: You haven't really proved you've got an agreement to arbitrate, is the real issue.

MR. BERMAN: I agree. And I think the only way for us to definitively prove it for the Court, and I think it could be done very quickly with a single one-document request by subpoena to AT&T.

THE COURT: All right.

MR. BERMAN: This notion --

THE COURT: You made that decision.

MR. BERMAN: Yes. So, this notion, Judge Patterson, with respect to whether an assignee can avail itself as a general matter of the right to arbitrate in the assignor's

contract, Ms. Tarantolo was right. Simply being an assignee is not enough. We have to shows the claims in issue are intertwined with the agreement.

THE COURT: She says you need a bill of sale.

MR. BERMAN: The bill of sale, I am afraid I don't understand that. We have the sworn statement of the general counsel that we acquired these -- we, Asta acquired these accounts. Nobody is calling that into question. Nobody is questioning the credibility of that. Suddenly there is a best evidence problem? We are not in front of a jury.

THE COURT: Has he got knowledge?

MR. BERMAN: Yeah.

THE COURT: What's his knowledge on -- how many accounts do you have here?

MR. BERMAN: What was the question?

THE COURT: How many accounts did they buy?

MR. BERMAN: In total? Thousands. I can see where you are going. Does he know the names? Before he signed the affidavit, and my colleague will correct me if I'm wrong, he went through the records of Palisades, the tranches of names -- let me be very clear. We don't only have a master bill of sale. We also have and have tendered to the Court account statements that have the last four of the Social, they have the address of these individuals, they have the name, and they show usage on the account, phone calls were made to and from. There

is an amount outstanding.

So, when Seth Berman -- and I don't know the man individually, but I'm informed by my colleagues -- when Seth Berman undertook to draft the affidavit, to affix his signature, he reviewed the business documents of his company. He didn't just say, yeah, I know, I remember Viruet and -- he went through the spreadsheets and he matched it up to the date of transaction. So, there is no real reason to call that sworn statement into question.

THE COURT: And the bill of sale? He got the bill of sale on all these accounts?

MR. BERMAN: Yes. We've spoken about this. This is why we tried to attach the document to the reply, to which, of course, the plaintiffs object and said, no, no, this is new evidence. And the only thing we can say or I think we tried to say is it was new evidence we introduced in response to the specific argument that we didn't foresee. We didn't think anyone was going to raise an objection that we were actually the assignee of these accounts. That's the conceptual predicate of the complaint. It is the conceptual predicate of this whole class action. Suddenly they say maybe you weren't really the assignee.

THE COURT: Is it in your reply papers, the bill of sale?

MR. BERMAN: Yes, your Honor. I'm informed that it

is. We can resend it or hand it up.

MR. UNIS: The two relevant bills of sale are attached to our reply papers, the sworn testimony.

MR. BERMAN: I'll leave that and move on.

Two final points. One is with respect to this solely exception. You can go to court under these arbitration agreements if the claim relates solely to the collection of debts. We say this is the farthest thing from that. This is a RICO, this is an FDCPA action. This doesn't relate solely to the collection of debts. Ms. Tarantolo --

THE COURT: That isn't the language of the provision.

MR. BERMAN: Let me grab the language of the provision. I think it is the language.

THE COURT: Relating to.

MR. BERMAN: Solely related to the collection of debts. Thank you, Judge.

What plaintiffs' counsel did was unintentional kind of sleight of hand, which was the way she rephrased it was this action relates solely to debt collection. There is a difference there.

THE COURT: That isn't what she said. That isn't what she said.

MR. BERMAN: Well --

THE COURT: That's what you said when she said you said.

MR. BERMAN: All right. In all events, our position remains, and instead of trying to rearticulate that chain of "she said I said," which I'll fail at, our position remains this action is the farthest thing from an action that relates solely to the collection of debts or however it is properly phrased.

There is ranging relief here. There are claims under the Racketeering Corrupt Organizations Act. That this does not relate solely to the collection of debts.

Final point on Rooker-Feldman. The notion is that federal courts don't sit as courts of appeal over state courts. But if this Court were to ultimately issue a ruling in Mr. Viruet's favor, the conclusion or the inference is inescapable that the state court was wrong.

THE COURT: It doesn't review those issues. That wasn't the issues before it.

MR. BERMAN: That's --

THE COURT: They were default judgments in a lot of cases.

MR. BERMAN: In a lot of cases they were. Not in his.

THE COURT: But there are two lines you say.

MR. BERMAN: Mr. Viruet specifically tried to vacate his judgment and failed.

THE COURT: But I don't know the grounds.

MR. BERMAN: How it was litigated is before the state

court.

THE COURT: I don't know the grounds.

MR. BERMAN: I understand that. But Rooker-Feldman is broader than that. It is broader than, well, we can't tell the grounds for the state court's decision, and because the grounds are ambiguous and not apparent from the face of the opinion, it is appropriate, nevertheless, to sit in judgment, as it were, of the state court's decision.

I acknowledge Rooker-Feldman has narrowed over the years, so this concept of appellate review has merged to the fore of the jurisprudence.

THE COURT: They are not asking for a ruling that the state court was wrong. They are arguing that improper practices were used in the collection of debts.

MR. BERMAN: When Mr. Viruet sought to vacate the judgment, the basis for seeking vacatur was that improper practices, bad service, and so forth, was used to obtain the judgment, and the state court disagreed.

Mr. Viruet had a full and fair opportunity in the state court to litigate the issue, to litigate the claim that the judgment was obtained by improper practices. If he chose not to flesh out the argument in full before the state court, then so be it. It is not for a putative class then to reraise it using him as a named plaintiff in the federal courts. My point is limited to that and really nothing else.

With that, if the Court has nothing else.

THE COURT: I have nothing else.

MR. BERMAN: Thank you, Judge Patterson.

THE COURT: I'm going to deny the motion for arbitration. I don't think the defendants have met their burden to establish that a binding agreement was made that require arbitration. I'm relying on the Hines v. Overstock.com, Inc. 380 Fed.Appx. 22, 24-5 (2d. Cir. 2010).

Furthermore, the arbitration provisions that were supplied in the sample used the term "relating to." As pointed out in In re Spiegel, Inc., 206 WL 2577825 p. 10 n. 4 of the Bankruptcy Court 2006, in the Southern District, pointed out this is a classically broad term and has an expressly bilateral nature.

Since defendants have not identified the arbitration agreements that mandate arbitration of Roberts and Viruet, I'm going to deny the motion.

The argument on the Rooker-Feldman doctrine, it seems to me that the Rooker-Feldman doctrine doesn't really apply to Viruet's claim because he's complaining of injuries caused by the defendants' misconduct by filing a lawsuit with insufficient information and review, and seeking default judgments on the basis of false affidavits. Not the state court judgment itself. Plaintiffs are relying on a Second Circuit case Gabriele v. American Home Mortgage Servicing, Inc.

503 Fed.Appx. 89, which relied on that critical distinction. Therefore, I'm not going to dismiss Viruet's claim on those grounds.

Since I'm not going to delay the decision on Bernhart and Brito at this point, I think that you can have the necessary discovery in connection with the class action motion. Plaintiff agree with that as I understand that it?

MS. TARANTOLO: Yes, your Honor.

THE COURT: I don't think the case should be delayed for any additional discovery. Let's get on with the case and add up the legal fees.

When do you want to have your conference?

MS. TARANTOLO: Your Honor, we would propose some time in January, depending on the Court's schedule.

THE COURT: You better do it before January.

MS. TARANTOLO: Your Honor, we're prepared to do the conference at any time.

THE COURT: I have a criminal case, and I've got a month.

MS. TARANTOLO: We will be ready to go.

THE COURT: It could fall apart in that month.

MS. TARANTOLO: We'll be ready to go as soon as the Court is available.

THE COURT: What is a date convenient? Why don't you confer with your opponents and see if you have a date in mind.

MS. TARANTOLO: Your Honor, to be clear, this is the date for a scheduling conference before the Court, not for the parties' own internal conference?

THE COURT: Right.

MS. TARANTOLO: Correct?

MR. BERMAN: Can we have, your Honor, some time to confer amongst ourselves and look at a calendar? I don't know what co-counsel for the Pressler defendants, I have no idea what their schedule is.

MR. WILLIAMSON: I'd like the opportunity to review my calendar, which I don't have with me.

THE COURT: Why don't you just advise me by letter this week.

MR. WILLIAMSON: That would be fine, your Honor. Thank you.

MS. TARANTOLO: Yes, your Honor. Thank you.

THE COURT: Okay. If it is inconvenient, I'll let you know.

MR. BERMAN: Judge Patterson, if I may, solely for the record because denial of a motion to compel arbitration is an appealable issue, I want it to be noted for the record that we are preserving all of our objections to the Court's finding.

THE COURT: Fine. Okay? Anything else?

MS. TARANTOLO: Nothing else, your Honor. Thank you.

THE COURT: Thank you.